Supreme Court, U.S.
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No.

IN THE

Supreme Court of the United States

PAUL GORDON ALLEYNE,

Petitioner,

v.

PEOPLE OF THE STATE OF CALIFORNIA,

Respondent.

On Petition for Writ of Certiorari to the California Court of Appeal, Fourth Appellate District, Division Three

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether affirming a conviction for conspiracy to commit murder where under state law proof of at least two or more conspirators and at least one overt act committed in furtherance of the conspiracy is required violated the federal due process substantial evidence rule because none of the alleged overt acts was perpetrated while two conspirators remained alive?

2. Assuming the Court of Appeal could properly expand by judicial interpretation the reach of California's conspiracy statute to include a situation in which one of only two conspirators dies before an overt act in furtherance of the conspiracy is committed, did the retroactive application of that interpretation to the present case violate federal due process?

3. By permitting the jury to convict of conspiracy based on overt acts which do not support a conspiracy conviction under state law, did the trial court deprive Petitioner of a fair trial?

4. Did failing to require the jury to unanimously agree on which of the 28 alleged overt acts was proved beyond a reasonable doubt violate Petitioner's rights to a fair trial and to a unanimous jury in violation of Petitioner's rights under the 5th, 6th and 14th Amendments?

5. Did admitting evidence that Petitioner had been arrested for sale and transportation of marijuana, on the premise that the seizure of the marijuana left him in debt, and thus provided a motive for him to commit murder for hire, despite the fact that the crimes charged had absolutely nothing to do with the sale of marijuana, violate due process?

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No. ____

IN THE

SUPREME COURT OF THE UNITED STATES

PAUL GORDON ALLEYNE,

Petitioner,

v.

PEOPLE OF THE STATE OF CALIFORNIA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE CALIFORNIA COURT OF APPEAL FOURTH APPELLATE DISTRICT DIVISION THREE

Petitioner, PAUL GORDON ALLEYNE, respectfully prays that a writ of certiorari issue to review the decision of a panel of Division Three of the Court of Appeal for the Fourth Appellate District of the State of California, affirming his conviction of conspiracy to commit murder.[1]

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[1] Appellant was convicted in a jury trial of conspiracy to commit murder in violation of California Penal Code Sections 182 and 187, attempted deliberate premeditated murder in violation of Penal Code Sections 664, (continued...)

OPINION BELOW

The opinion of the California Court of Appeal was certified for partial publication and it appears in the official reports at 82 Cal.App.4th 1256, 98 Cal.Rptr.2d 737. The opinion was originally filed on July 31, 2000. On August 10, 2000, the Court of Appeal modified the opinion and denied Petitioner's Petition for Rehearing.[2] The California Supreme Court denied Petitioner's Petition for Review of the decision of the Court of Appeal on November 15, 2000. The opinion of the Court of Appeal affirming the convictions, as well as the Order Modifying the Opinion, and the state Supreme Court order denying review are reproduced in the Appendix.

JURISDICTION

Jurisdiction of the Court is invoked pursuant to 28 U.S.C. Section 1257, subdivision (a). The order of the Supreme Court denying discretionary review was entered on November 15, 2000. Under Rule 13.1 of the Rules of this Court, this Petition is timely filed.

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[1](...continued)
subdivision (a) and 187, and second degree robbery in violation of Penal Code Sections 211 and 212.5, subdivision (c). He was sentenced to 25 years to life on the conspiracy count, plus 4 years for the use of a firearm. The sentences on the remaining counts were stayed.

[2] In the proceeding below Paul Gordon Alleyne, Petitioner herein, appeared as defendant and appellant; the People of the State of California appeared as plaintiff and appellee.

STATUTES AND CONSTITUTIONAL PROVISIONS INVOLVED

This petition involves the due process clauses of the Fifth and Fourteenth Amendments and the Sixth Amendment Right to a Jury Trial. In addition, California Penal Code Sections 182(b), 183, 184, 187, 211, 212.5 and 664, as well as California Evidence Code Sections 1101 and 1223 are involved. Each of the California Statutes is set out in the Appendix.

HOW THE FEDERAL QUESTIONS WERE RAISED AND DECIDED BELOW

The federal questions presented on this Petition were raised in the direct appeal from judgment of conviction in state court. The opinion of the Court of Appeal sets out the evidence adequately to frame the federal constitutional issues presented, although it treats some of the contested evidence as established fact. This is significant only insofar as the issues here relate to the impact of improper jury instructions and inadmissible or improperly received motive evidence.

Essentially, the prosecution theory of Petitioner's guilt was that he owed Coleman Allen some money he had borrowed from him. Allen wanted Leonard Mundy to murder James Wengert because he also owed Allen money that had not been repaid. Mundy apparently murdered a woman he mistakenly believed to be Wengert's wife at Allen's direction.

Nine months later (according to Wengert's trial testimony), Petitioner approached Wengert in a parking garage

with a gun, demanded and took his wallet, and shot him in the jaw. Wengert did not die.

Although he did not know it, Allen had died four days before the shooting. Within a week Petitioner contacted Allen's wife and explained that Allen owed him $45,000. At her request Petitioner explained to David Warkentine, an attorney and investigator representing Mrs. Allen, that the debt involved a hit on a man in San Clemente who owed Allen money (which by inference was Wengert). According to Petitioner, Allen had arranged for some men to carry out that hit, and thereafter directed Petitioner to arrange to make the $45,000 payment to them.[3] There was no evidence of any overt acts occurring in any alleged Allen-Alleyne conspiracy before Allen died.

On appeal Petitioner alleged that his conviction for conspiracy to commit murder violated federal due process and his Sixth Amendment right to a jury trial for the following reasons:

1. The evidence of conspiracy (which under state law requires proof of two or more conspirators and at least one overt act committed in furtherance of the conspiracy) was insufficient under federal due process because none of the alleged overt acts was perpetrated while

[3] Although the Opinion of the Court of Appeal states (App. 5) that "Allen arranged for Alleyne to pay some men to carry out the hit," the trial evidence showed that Petitioner's statement to Warkentine was that this arrangement was after the fact.

two conspirators remained alive.[4]

2. Assuming the Court of Appeal could properly expand by judicial interpretation the reach of California's conspiracy statute to include a situation in which one of only two conspirators dies before an overt act in furtherance of the conspiracy is committed, retroactive application of that interpretation to the present case violated federal due process.

3. By permitting the jury to convict of conspiracy based on overt acts which do not support a conspiracy conviction under state law[5], the trial court deprived Petitioner of a fair trial.

4. Failure to require the jury to unanimously agree on which of the 28 alleged overt acts was proved beyond a reasonable doubt deprived Petitioner of a fair trial and the right to a unanimous jury in violation of the 5th, 6th and 14th Amendments.

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[4] One of only two died before the first alleged overt act.

[5] I.e., overt acts committed (if at all) after the object of the conspiracy had been completed or abandoned. (Cf., *People v. Marks*, 45 Cal.3d 1335, 1345 (1988), and *People v. Zamora*, 18 Cal.3d 538, 560 (1976), following the reasoning of this Court in *Grunewald v. United States*, 353 U.S. 391 (1957).)

Because it infected the entire trial, in which Petitioner challenged the extraordinarily attenuated eyewitness identification evidence proffered to prove he was the person who shot Wengert in the jaw, Petitioner also argued on appeal that his entire conviction was obtained in violation of the due process right to a fair trial. This was the result of the ruling by the trial court allowing the prosecutor to prove not only that Petitioner owed Allen a large amount of money, but to prove that the debt was the result of his arrest for possession for sale and transportation of marijuana which was seized on his arrest. Specifically, Petitioner argued:

> 5. Despite the fact that the crimes charged had absolutely nothing to do with the sale of marijuana, the trial court erroneously permitted the prosecutor to introduce evidence that prior to the shooting of Wengert, Petitioner had been arrested for sale and transportation of marijuana, on the premise that the seizure of the marijuana left him in debt, and thus provided a motive for him to commit murder for hire. This ruling deprived Petitioner of a fair trial on all counts.

SUMMARY OF ARGUMENT

Since the crime of conspiracy in California requires proof that two or more persons conspire to commit an illegal object and at least one overt act is perpetrated in furtherance of that agreement, and since one of only two alleged conspirators had died before any overt act alleged was perpetrated, the

evidence was insufficient under the federal due process standard to prove the crime charged because it lacked proof of the essential element of an overt act committed while two conspirators remained.

Even if the novel interpretation of California statutory conspiracy law were permissible as a theory of conspiracy in which a person may be convicted when the overt act is committed at a time when there is only one of the alleged conspirators alive, that interpretation was a sufficient departure from California law that it could not be constitutionally applied to this case under the due process rule that a Court may not do by judicial interpretation what the ex post facto clause prohibits the legislature from doing by statutory amendment or enactment.

In addition, the conspiracy conviction in this case was flawed by two unconstitutional instructional errors: (1) The court permitted the jury to convict of conspiracy based on overt acts that could not constitute acts "in furtherance" of the alleged conspiracy because, as the prosecutor conceded on appeal, the acts were committed after the conspiracy was ended (by the shooting of Wengert); and (2) the trial court refused to instruct that the jury must unanimously agree on at least one overt act.

Contrary to the holding of the Court of Appeal, the first error (which was conceded by the state) was not harmless beyond a reasonable doubt because the jury also convicted Petitioner of personally shooting and attempting to kill Wengert. The analysis in the opinion of the court appears to have substituted the judgment of the reviewing court for that of the jury on the question of whether the shooting was "in furtherance of the alleged conspiracy," and found it to be so as

a matter of law.

Of course, since that agreement and conspiracy could not possibly be underway once Allen died, the failure of the Court of Appeal to find the conceded constitutional error to be prejudicial was also constitutional error.

Finally, the receipt in evidence of Petitioner's felony arrest for possession of a large quantity of marijuana for sale was fundamentally unfair, as it branded him a drug dealer and criminal in a case in which there was a substantial question whether he was indeed the person who shot Wengert. The obvious prejudice from the probability that the jury would allow this evidence to influence its decision whether to find Petitioner was the shooter deprived Petitioner of a fair trial.

1. Insufficient Evidence Was Presented Under This Court's "Substantial Evidence" Due Process Cases.

On appeal, Petitioner argued that since an overt act in furtherance of the object of a conspiracy is an essential element of the crime of conspiracy in California, and since none was ever committed while two conspirators survived, there never was a completed crime of conspiracy proved. Specifically, Petitioner argued there cannot be a "completed crime of conspiracy when one of the only two alleged conspirators dies before either has committed an overt act in furtherance of the agreement."

This Court is urged to grant certiorari to review and reverse the judgment of the Court of Appeal affirming Petitioner's conspiracy conviction because it was obtained in violation of the federal due process rule requiring proof beyond

a reasonable doubt of each element of the crime charged. (*Jackson v. Virginia*, 433 U.S. 307, 313-315 (1979).)

There can be no doubt that prior to the (partially) published decision in this case, no California court had ever interpreted California's conspiracy statute as allowing a conviction where the prosecution failed to prove: (1) an agreement to commit an unlawful act; (2) at least two conspirators; and (3) at least one overt act committed in furtherance of that agreement. (*People v. Swain*, 12 Cal.4th 593, 600 fn. 1 (1996); *People v. Crosby*, 56 Cal.2d 713, 727-728 (1962) [the overt act marks the commission of the crime and fastens criminal liability upon the conspirators].)

California statutory law virtually prohibits the Court of Appeal's decision in this case. First, in Section 182 of the Penal Code, the punishment for the crime of conspiracy to commit various other unlawful objects (crimes) is set out. Subdivision (b) of Section 182 of the California Penal Code states "the defendant cannot be convicted unless one or more overt acts are expressly alleged in the indictment or information, nor unless one of the acts alleged is proved."[6] Section 183 states "no other conspiracies other than those enumerated in the preceding section are punishable criminally."[7] Finally, Section 184 states:

> "No agreement amounts to a conspiracy unless some act besides such agreement, be done within this state to effect the object thereof, by one or more of the parties to such agreement and the trial of cases of conspiracies

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[6] Appendix, p. 16.

[7] Appendix, p. 16.

may be had in any county in which any such act be done." (App., 16).

Clearly, the agreement itself has not ripened into a conspiracy unless and until there is an overt act to effect the object of that agreement. Under California case law, however, there must be at least two persons to conspire. (*People v. Austin*, 23 Cal.App.4th 1596, 1603-1608 (1994); *People v. Superior Court (Jackson)*, 44 Cal.App.3d 494 (1975)[8]; *People v. Palmer*, – Cal.4th –, 103 Cal.Rptr.2d 13, 15 P.3d 234, 2001 Daily Journal D.A.R. 667 (filed Jan. 18, 2001).) In *People v. Palmer, supra*, in fact, the California Supreme Court very recently confirmed that "it does take two to conspire. But to go '[f]rom this irrefutable proposition' to a rule requiring reversal of the inconsistent verdict is a 'precipitous leap.'" (citing *United States v. Andrews*, 850 F.2d 1557, 1560 (11th Cir. 1988). (*Palmer*, at *18.)

In the present case, the Court of Appeal appears to have refuted what the California Supreme Court just a few months later acknowledged to be irrefutable under California law by finding that when Petitioner committed the first overt act four days after his only alleged co-conspirator had died, the crime of conspiracy was revived and completed even without at least two conspirators.

In the present case it was not disputed that no overt acts were proved at any time after the agreement was formed, while two conspirators – Allen and Petitioner (Alleyne) – survived.

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[8] Overruled on another point in *People v. Palmer*, – Cal.4th –, 103 Cal.Rptr.2d 13, 15 P.3d 234, 2001 Daily Journal D.A.R. 667 (filed Jan. 18, 2001). In *Palmer* the Supreme Court of California discarded the prior holdings in *Jackson* and similar cases where inconsistent verdicts in which one of the conspirators was convicted but all others were acquitted was held to require reversal of the one conspiracy conviction obtained.

Rather, the overt act upon which the Court of Appeal relied in affirming the conviction (the shooting of Wengert in the jaw), was committed four days after Allen had died.

The Court of Appeal admitted that there was no precedent in California law upholding a conspiracy conviction on this fact pattern, and erroneously analogized this case to one in which two conspirators survived, but where one of them was not subject to prosecution. The case was *People v. Eberhardt* 169 Cal.App.3d 292, 299-300 (1985), where the Court of Appeal held a husband could be convicted of conspiracy to fish illegally on an Indian reservation even though his co-conspirator (his native American wife) was immune from prosecution. That analogy was flawed on its face because in that case two conspirators survived to the time of the first overt act. The two did agree to accomplish an unlawful object and set about to do so. The mere fact that one could not be prosecuted in no way distinguished the case from one in which immunity is granted to a co-conspirator in exchange for evidence against the other one, or in which a co-conspirator dies after the object has been achieved, and cannot be prosecuted.

When this fact was suggested by Petitioner, the Court of Appeal pointed out that in the *Eberhardt* case, one of the two conspirators had been immune from prosecution at all times, unlike the examples cited. But this is a distinction without a difference, since it in no way detracts from the fact that the immune conspirator was at all times a living conspirator. The crime of conspiracy was complete because there were two conspirators when the third element was manifested – i.e., when an overt act was done. *Eberhardt* itself made this point by noting that the facts there were different from a case in which one of the alleged conspirators was actually innocent of

the crime. Instead, the Court there noted those cases were not controlling *because* they "involved innocence of the alleged coconspirator, not immunity." In other words, the wife was a second conspirator who supplied the "two or more persons to conspire" element, even though she could not be prosecuted.

At the time that the overt act element of the crime was committed in this case, however, there were no longer two or more persons conspiring, so there was no conspiracy ever completed.

Long before (at least four days before) the first overt act was done, the crime of conspiracy had already failed because no overt act was ever perpetrated while there were two agreeing conspirators.[9] When Allen died, any chance of a conspiracy being committed under California law died with him.

Since federal due process prohibits conviction of a person in the absence of proof of each essential element of the crime charged (*In re Winship*, 297 U.S. 358 (1970), *Jackson v. Virginia*, *supra*), Petitioner's conspiracy conviction was unconstitutional, and the decision of the Court of Appeal affirming it was contrary to well established federal constitutional law under the decisions of this Court. As Justice Stewart wrote for the Court in *Jackson* "a conviction based upon a record wholly devoid of any relevant evidence of a crucial element of the offense charged is constitutionally infirm." (*Jackson*, *supra*, 443 U.S. at 314, citing *Thompson v.*

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[9] An illustration may clarify the importance of the temporal confluence of the elements of the crime of conspiracy. Assume a father and son are discussing the father's hatred of the man who has stolen the heart of his wife (the mother of the son). The father and son agree that the son will kill the man on a date in the future. Prior to any action being taken to carry out the plan the father dies. Time passes and the son attempts to kill the man. Petitioner can find no authority in any jurisdiction (including California) in which this act would be subject to prosecution as a conspiracy to murder.

Louisville, 362 U.S. 199, *Vachon v. New Hampshire*, 414 U.S. 478; *Adderly v. Florida*, 385 U.S. 39; *Gregory v. Chicago*, 394 U.S. 111; and *Douglas v. Buder*, 412 U.S. 430, 93 S.Ct. 2199, 37 L.Ed.2d 52.)

2. The New Rule Announced By The Court Of Appeal Allowing A Conviction Of Conspiracy Where Only One Alleged Co-conspirator Survives To The Time Of The First Overt Act Could Not Constitutionally Be Applied To This Case.

As Petitioner argued in his Reply Brief in the Court of Appeal, after the Attorney General suggested that there was no need to have two co-conspirators to prove a conspiracy at the time the third essential element – an overt act – was established, "in the event Respondent prevailed on some court to judicially enlarge conspiracy liability to fit the novel and potentially far reaching theory advanced on appeal, constitutional due process principles would bar its application to appellant's case." (citing *People v. Wharton*, 53 Cal.3d 522, 586 (1991), where the state Supreme Court discussed due process decisions of this Court cited on this point hereafter.).

Indeed this is correct, and the decision of the Court of Appeal itself violated this Court's due process rule established in *Bouie v. City of Columbia*, 378 U.S. 347, 353-354, 12 L.Ed.2d 894, 84 S.Ct. 1697. 1702-1703 (1964); *Marks v. United States*, 430 U.S. 188, 191-192, 51 L.Ed.2d 260, 97 S.Ct. 990, 992-993 (1977); and *Rabe v. Washington*, 405 U.S. 313, 93 S.Ct. 993, 31 L.Ed.2d 258 (1972).)

In *Bouie v. City of Columbia, supra*, 378 U.S. 347, 353-354, 12 L.Ed.2d 894, 84 S.Ct. 1697. 1702-1703 this Court held:

> "[A]n unforeseeable judicial enlargement of a criminal statute, applied retroactively, operates precisely like an ex post facto law, such as Art. I, s 10, of the Constitution forbids. * * * [Fn.Om.] If a state legislature is barred by the Ex Post Facto Clause from passing such a law, it must follow that a State Supreme Court is barred by the Due Process Clause from achieving precisely the same result by judicial construction. Cf. Smith v. Cahoon, 283 U.S. 553, 565, 51 S.Ct. 582, 586, 75 L.Ed. 1264. The fundamental principle that 'the required criminal law must have existed when the conduct in issue occurred,' Hall, General Principles of Criminal Law (2d ed. 1960), at 58--59, must apply to bar retroactive criminal prohibitions emanating from courts as well as from legislatures. If a judicial construction of a criminal statute is 'unexpected and indefensible by reference to the law which had been expressed prior to the conduct in issue,' it must not be given retroactive effect. Id., at 61." [Underlining supplied.]

In *Marks v. United States, supra*, 430 U.S. 188, 191-192, 51 L.Ed.2d 260, 97 S.Ct. 990, 992-993, this Court held (citing) *Bouie, supra*:

> "The Ex Post Facto Clause is a limitation upon the powers of the Legislature, see Calder v. Bull, 3 Dall. 386, 1 L.Ed. 648

> (1798), and does not of its own force apply to the Judicial Branch of government. Frank v. Mangum, 237 U.S. 309, 344, 35 S.Ct. 582, 593, 59 L.Ed. 969 (1915). But the principle on which the Clause is based on the notion that persons have a right to fair warning of that conduct which will give rise to criminal penalties is fundamental to our concept of constitutional liberty. See United States v. Harriss, 347 U.S. 612, 617, 74 S.Ct. 808, 811, 98 L.Ed. 989 (1954); Lanzetta v. New Jersey, 306 U.S. 451, 453, 59 S.Ct. 618, 619, 83 L.Ed. 888 (1939). As such, that right is protected against judicial action by the Due Process Clause of the Fifth Amendment."

The decision of the California Court of Appeal to affirm Petitioner's conviction for the crime of conspiracy to commit murder appears to have violated this due process rule, because prior to this case, no California case had ever upheld a conspiracy conviction based on overt acts that occurred after one of two conspirators dies.

Specifically, the Court of Appeal's opinion itself states:

> "Alleyne cites no authority, and we have found none, that explains how the death of one of two conspirators, who have entered into the requisite agreement, could affect the culpability of the other conspirator who goes on to commit an overt act in furtherance of the conspiracy." (Appendix, 6-7.)

There appears to be no dispute that no prior California case held that a conspiracy continued after the death of one of (only) two conspirators, and the Court of Appeal conceded that the California Supreme Court had held in *People v. Superior Court (Jackson)*, 44 Cal.App.3d 494, 498, 118 Cal.Rptr. 702, that at least two people are the minimum number of people required for a conspiracy.[10] Indeed, that rule has been affirmed since the decision of the Court of Appeal in this case by the state Supreme Court's decision in *People v. Palmer*, *supra*.

In addition, although the only case relied upon by the Court of Appeal did not involve the death of a conspirator, the Court proceeded to enlarge the circumstances in which a California defendant could be held liable for the crime of conspiracy in an unpredictable way, based on general principles. Relying on the added confidence that a conspiracy may give someone, and the fact that sharing a criminal purpose may embolden a criminal, the Court of Appeal unexpectedly converted a set of facts that clearly fits outside of the statutory and case law definition of conspiracy solely because similar policy considerations may have been present. But that type of enlargement of a statute's reach is precisely the type of legislative activity that this Court's above-quoted decisions have consistently held must not and cannot be retroactively applied without offending due process.

Whether or not the Court of Appeal had the power to expand California's definition of conspiracy to cover a case in which there is no overt act while there are two alleged co-conspirators, and there are not two co-conspirators when there

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[10] In *Jackson*, the Court had reversed a conviction of a defendant who was convicted of conspiracy after his alleged co-conspirator was acquitted. That decision has since been overruled, but that overruling was *after* the opinion in this case was filed.

is an alleged overt act, it could not constitutionally affirm Petitioner's conviction on that basis.

Certiorari should be granted to re-affirm the due process prohibition on retroactive application of judicial activism factually enlarging the reach state law criminal statutes.

3. Allowing The Jury To Convict On The Basis Of Impermissible Overt Acts Alleged Violated Due Process

Under California law, to support a conspiracy conviction, an overt act must be in furtherance of, and therefore must follow the agreement of, the conspirators. In this case the jury was instructed it could use any of 28 alleged overt acts to supply the overt act element of the conspiracy charge. However, as the opinion of the Court of Appeal notes, "[t]he Attorney General concedes, . . . the first six overt acts could not support the conspiracy because no evidence showed [Petitioner] was a member of the conspiracy when they occurred." (Appendix, p. 9.)

In addition, as the parties agreed, this error in instruction was subject to review under the *Chapman v. California*, 386 U.S. 18 (1967) harmless beyond a reasonable doubt standard.

Nevertheless, the Court of Appeal found the error harmless because, it reasoned, the jury had found at least two later overt acts to be proven – the pointing of the gun at, and the shooting of, Wengert.

This holding completely ignores two aspects of the case: (1) there was no necessary determination by the jury that

these acts, which occurred after Allen died, were, as required by state law and the instructions given, "in furtherance of the charged conspiracy" [Cf., California Penal Code Section 184, Appendix, p. 16.]; and (2) that act was too late, just as the first six alleged overt acts were too early.

The overt acts relied upon by the Court of Appeal were acts committed after the conspiracy had died with Allen.

In addition, many of the other charged overt acts (Overt Acts 20-28) related to Petitioner's alleged efforts to get $45,000 from Mrs. Allen. Under California law, these acts were clearly ineligible to sustain a conspiracy charge because the conspiracy ended no later than the shooting of Wengert. These acts were committed (if at all) after the object of the conspiracy had been completed or abandoned. (Cf., *People v. Marks*, 45 Cal.3d 1335, 1345 (1988), and *People v. Zamora*, 18 Cal.3d 538, 560 (1976), following the reasoning of this Court in *Grunewald v. United States*, 353 U.S. 391 (1957).)

The Court of Appeal failed to seriously consider, let alone address, the fact that the jury that convicted Petitioner of conspiracy was given 28 overt acts to choose from, under circumstances where the first 6 and last 8 (i.e., fully half of the alleged overt acts) could not, as a matter of law, have supported the charge, even if they were unanimously found by the jury to have been true.

Moreover, the remaining overt acts, which occurred after Allen died of unrelated causes, could not support the conspiracy charge because they were too late, as explained above.

In these circumstances, Petitioner was deprived of both a fair trial, and trial by jury as guaranteed by the due process clause of the Fourteenth Amendment and the Sixth Amendment, and of a fair state appellate review as also protected by due process. (Cf., *Anders* v. *California*, 386 U.S. 738 (1967) [States must provide some corrective process to adjudicate claims of violations of federal constitutional guarantees.]

In any event it appears to be well established that the federal constitution requires the states to provide a meaningful review process in which the state courts fully consider and adequately decide each and every federal constitutional claim properly made to the reviewing court. (cf., *Case* v. *Nebraska* 381 U.S. 336 (1965) Douglas, J., conc.).

By permitting the jury to convict of conspiracy based on overt acts which do not support a conspiracy conviction under state law, the trial court deprived Petitioner of a fair trial and Certiorari should be granted to review and remedy this federal constitutional violation.

4. The Absence Of A Unanimity Instruction As To The Overt Act Violated Due Process And The Right To A Jury Trial.

On appeal, Petitioner argued that the failure to require the jury to unanimously agree on which of the 28 alleged overt acts was proved beyond a reasonable doubt deprived Petitioner of a fair trial and the right to a unanimous jury in violation of the 5th, 6th and 14th Amendments.

The Court of Appeal did not analyze this question but instead found it had been disposed of by virtue of two facts: (1) Petitioner did not challenge the sufficiency of the evidence that he (personally) shot Wengert in the jaw; and (2) that act [which concededly occurred four days after Allen had died] was necessarily found to be true unanimously because Petitioner was also charged with and convicted of attempted murder of Wengert and the jury necessarily found he was the person who shot Wengert, because it also found true an enhancement allegation that Petitioner personally used a firearm in the commission of that offense.

This finding was constitutionally flawed for two reasons: (1) Since the shooting was not "in furtherance of the charged conspiracy" which ceased to exist when Allen died four days before, *it* could not be an overt act on which the conspiracy conviction was based, even if it was found true unanimously; and (2) even if that act *could have been* in furtherance of the conspiracy, it was the exclusive province of the jury to determine not only *whether* the act was committed, but whether it was committed in furtherance of the charged conspiracy.

Once Allen died, the jury was free to conclude that the shooting of Wengert which it found to have been perpetrated by Petitioner was not "to effect the object" of his agreement with Allen, but was a decision he made on his own. Even if the evidence would support that finding, there is no question in this case that only the Court of Appeal made it – not the jury.

This aspect of the case alone violates the constitutional principles given voice in *Sullivan v. Louisiana*, 508 U.S. 275, 281 (1939) where it was observed that when a reviewing court resolves a factual issue necessary to a conviction, "the wrong

entity judges the defendant guilty," and Petitioner asserts that usurpation of the jury's function violated both his right to due process and to a jury trial (cf., *Apprendi v. New Jersey*, – U.S. –, 120 S.Ct. 2348, 2356 [holding the right to have the jury determine every fact essential to permit the court to convict and punish the defendant under state law, beyond a reasonable doubt, is guaranteed by the due process clause, regardless of whether that fact is labeled an "element" of the crime charged or not.]

5. Prejudicial, Irrelevant Evidence That Petitioner Was A Drug Dealer Deprived Him Of A Fair Trial Violating Federal Due Process

Despite the fact that the crimes charged had absolutely nothing to do with the sale of marijuana, the trial Court erroneously permitted the prosecutor to introduce evidence that prior to the shooting of Wengert, Petitioner had been arrested for sale and transportation of marijuana, on the premise that the seizure of the marijuana left him in debt, and thus provided a motive for him to commit murder for hire. This ruling deprived Petitioner of a fair trial on all counts.

In the trial and on appeal Petitioner argued that evidence that he had been arrested for transportation and possession for sale of marijuana was inadmissible.

The Court of Appeal recognized that under state law evidence of other crimes is inadmissible if the prejudicial value of such evidence outweighs its probative value[11], and further recognized that under state law poverty or indebtedness is

[11] Cf., California Evidence Code, Section 1101. App. 15.

usually inadmissible to show motive. (See Opinion, App. 11-12.)

Nevertheless, the Court held this evidence fit into the exception to the rule of exclusion that "when an indebtedness is directly related to the charged crime" it may be admissible to establish motive. The Court also rejected the contention that evidence of drug dealing was prejudicial. Specifically, the Court stated:

> "Some prejudice is inherent in evidence the accused committed another crime. Transportation of marijuana is not a violent crime, however, and the jury was unlikely to assume that if Alleyne [Petitioner] was willing to transport marijuana, he would automatically be inclined to kill someone." (Opinion of Court of Appeal, Appendix, p. 12.)

Finding the evidence of the fact defendant owed $30,000 to be "highly probative," the Court found there was no error at all in admitting the evidence.

This analysis fails to take account of two very different concepts. First, there is no necessary linkage between the fact defendant owed $30,000, and the reason he owed it (i.e., that his marijuana had been seized when he was arrested for being a drug dealer). Second, while there may be some probative value in the fact of the debt, evidence of the unadjudicated accusation that Petitioner was a marijuana dealer was inadmissible for any purpose under state law.

In other words, it was not the crime for which defendant was charged that was relevant (in any way) to motive, but the

fact that he was $30,000 in debt, regardless of why.

Moreover, the mixing of the two questions confused the evidentiary issue from a due process, constitutional point of view. Federal courts have held that when an item of prejudicial evidence received in a state trial is inadmissible for any purpose, the ruling allowing it to be heard by the jury is subject to due process review.

In some respects, this case is similar to *McKinney* v. *Rees*, 993 F.2d 1378 (9th Cir. 1993). There the Ninth Circuit held California's admission of prior bad act evidence violated due process and affirmed the granting of a habeas corpus petition to vacate the judgment in a murder case. In that case, the contested evidence related to prior instances that the defendant used a knife. The Ninth Circuit carefully considered whether any of that evidence "were evidence from which inferences relevant to any fact of consequence may have been drawn." (993 F.2d at p. 1382). The Court concluded that "much of the disputed other act evidence [was] probative only of character and, thus, [was] irrelevant." (*Id.*, at p. 1384).

The Court then went on to determine if the admission of the evidence was prejudicial.[12] The Court quoted from both *Dowling* v. *United States*, 493 U.S. 342, 110 S.Ct. 668, 107 L.Ed.2d 708 (1990)[13] and *Michelson* v. *United States*, 335 U.S.

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[12] The Court said: "There are *no* permissible inferences the jury could have drawn from the character evidence discussed above. The admission of this evidence, therefore, could have violated due process. We must now consider whether, under the facts of this case considered as a whole, the admission of irrelevant character evidence did violate due process." (*Id.*, at p. 1384.

[13] Stating that due process is violated if the action complained of "violates those fundamental conceptions of justice which lie at the base of

(continued...)

469, 475-476, 69 S.Ct. 213, 218, 93 L.Ed. 168 (1948)[14] and concluded the evidence was prejudicial "emotionally charged," "served to prey on the emotions of the jury" and that the case was not a weighty one, but one of credibility.

> "Because of the lack of a weighty case against McKinney, and the pervasiveness of the erroneously admitted evidence throughout the trial, we think it highly probable that the error had substantial and injurious effect or influence in determining the jury's verdict. * * * Because his trial was so infused with irrelevant prejudicial evidence as to be fundamentally unfair, McKinney is entitled to the conditional writ of habeas corpus that the district court awarded him." [fn.om.]" *McKinney* v. *Rees*, 993 F.2d 1378, 1386. (See also *Henry* v. *Estelle*, 993 F.2d 1423 (9th Cir. 1993).)

Here too, there was a substantial dispute regarding the identity of the shooter of Wengert, and it turned almost entirely

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[13](...continued)
our civil and political institutions, and which define the community's sense of fair play and decency." (493 U.S. at 353, 110 S.Ct. at 674) (internal quotation marks and citations omitted).

[14] "The inquiry [into defendant evil character, prior trouble with the law, specific criminal acts, or ill name among his neighbors] is not rejected because character is irrelevant; on the contrary, it is said to weigh too much with the jury and to so overpersuide them as to prejudge one with a bad general record and deny him a fair opportunity to defend against a particular charge."

It may be noted that *Michelson* was cited with approval where the Supreme Court shared "concerns that unduly prejudicial evidence might be introduced under" a federal rule similar to California's Evidence Code § 1101(b). *Huddleston* v. *United States*, 485 U.S. 681, 691, 99 L.Ed.2d 771, 783, 108 S.Ct. 1496 (1988).

upon a cross-racial identification which Petitioner's experts believed to be totally unreliable. For that reason, the marijuana dealing evidence was highly prejudicial, and likely to affect the jury's evaluation of the strength of that evidence. Moreover, the suggestion by the Court of Appeal that there was no prejudice merely because the jury was not likely to "automatically" convict based on it ignores the substantial association jurors are likely to make between drug dealers and guns. This Court is well aware that in the mind of the public as well as law enforcement, drug dealers are expected to be armed and prepared to use firearms in their drug dealing activities. Contrary to the conclusion of the Court of Appeal, there was every reason to believe that this drug dealer evidence (which was totally unnecessary to show Petitioner was in debt) likely played a significant and perhaps a dispositive role in persuading the jury to accept the questioned identification of Petitioner as the shooter of Wengert.

Petitioner contends that while the other crime evidence (that he had been charged with sales of marijuana) must be judged by due process standards for evidence which is inadmissible for any valid purpose under state law, the evidence of his debt must be judged under the rule of *Perry v. Rushen*, 713 F.2d 1447, 1453 (9th Cir. 1983) ("Due process draws a boundary beyond which state rules cannot stray."), *cert. denied*, 469 U.S. 838, 105 S.Ct. 137, 83 L.Ed.2d 77 (1984). See *Jammal* v. *Van De Kamp* (9th Cir. 1981) 926 F.2d 918, 919.

In addition, even the evidence that Petitioner was in debt lent little probative value to the prosecution's case, but it was used as though it was proof that he was the person who shot Wengert.

Where, as here, the case was a close one, the state should not be permitted to offer highly prejudicial inflammatory evidence that the defendant was a drug dealer under the guise of motive evidence in a murder for hire case, when the murder was not alleged to have anything to do with drugs. This evidence alone deprived Petitioner of a fair trial and Certiorari should be granted to review and reverse the judgment of conviction in its entirety.

Conclusion

For all these reasons, this Court is urged to grant the writ and reverse the judgment of the state Court of Appeal affirming Petitioner's conviction.

WHEREFORE, Petitioner prays that this Honorable Court grant his Petition and issue its Writ of Certiorari.

Respectfully submitted this 13th day of February, 2001.

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